# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 19, 2009 |
| v | No. 283059<br>Kalkaska Circuit Court |
| AARON MICHAEL CLOUTIER,<br><br>Defendant-Appellant. | LC No. 06-002781-FH |

Before: K. F., Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant appeals of right his jury trial convictions of assault with intent to murder, MCL 750.83, two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and operating a motor vehicle with a suspended or revoked license, MCL 257.904. Defendant was found not guilty of one additional count of assault with intent to murder. He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of 156 to 480 months for assault with intent to murder, 30 to 72 months for each count of felonious assault, 36 to 90 months for felon in possession of a firearm, 2 years for each count of felony-firearm, and 12 months for operating a motor vehicle with a suspended or revoked license. We affirm.

All of the charges and convictions in this case arise from a confrontation between defendant and two police officers. Michigan State Police officers Rick Sekely and Shawn Wise visited defendant at his motor home during the course of an investigation and discovered that defendant had been driving on a suspended or revoked license, which defendant admitted. After informing defendant that he was being placed under arrest, defendant reached under his seat cushion and retrieved a gun. As defendant began to raise the gun, Officer Sekely grabbed defendant's hands, struck defendant in the head with a flashlight, and eventually disarmed defendant after a struggle.

Defendant argues that the trial court erred in denying his motion for a directed verdict on the charge of assault with intent to murder Officer Sekely, and also that there was insufficient evidence to support this conviction. We disagree. We review a trial court's decision on a motion for directed verdict and claim of insufficient evidence de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of

fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (citations and internal quotation marks omitted). Defendant contends that because there is no evidence that he pointed the gun at the officer, pulled the trigger, attempted to pull the trigger, or even touched the trigger, the element of intent had not been shown. We note, however, that "[a]n actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted). The trier of fact has the role of determining the weight of the evidence and the credibility of the witnesses, and the appellate court will not interfere with this determination. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Officer Sekely testified that during the conversation he and his partner had with defendant, defendant said in a very firm manner, "I'm not going to jail." Soon thereafter, defendant said "get out; I'm not going to jail; get out." Officer Sekely then told defendant he was under arrest and asked him to stand and put his hands behind his back. Officer Sekely continued:

> [A]t which point he said okay, he partially stood up—he's sitting on the bench seat, partially stood up, lifted the cushion up that he was sitting on, and reached down and grabbed a black-in-color handgun that I could see obviously from where I was standing, started to pull it out and bring it towards myself and Trooper Wise.

As soon as Officer Sekely saw the gun, he took one step toward defendant, grabbed defendant's hands, and a struggle ensued. Officer Sekely testified that at some point, defendant's hands were up against the wall with the gun, allowing the officer to reach over and hit defendant on the head with a flashlight three times. When defendant released his grip on the gun, Officer Sekely was able to get it away from him. Approximately a minute passed from the time Officer Sekely told defendant he was under arrest until the time he was handcuffed. Officer Sekely testified that after defendant was handcuffed, he made some unsolicited statements about how he knew he had screwed up and just did not want to go to jail.

Officer Wise testified that once the commotion started between Officer Sekely and defendant, he pulled his gun out and stuck it in defendant's chest. Officer Wise said that he "was getting ready to pull the trigger" when Officer Sekely informed him that he had recovered the gun from defendant. Defendant then said, "you got me," and Officer Sekely handcuffed him.

After defendant's arrest, the officers discovered that the 32-caliber handgun involved in the incident was loaded, with one live round in the chamber and five rounds in the magazine. Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow the

jury to infer the requisite intent. Defendant was belligerent, expressed not just a desire but an intent not to go to jail, and then reached for a gun when he was told that he was under arrest. Officer Sekely testified that defendant was bringing the gun toward the officers. The fact that the officers successfully interceded and disarmed defendant at that point arguably eliminated the possibility that other types of supporting evidence would transpire, such as actually pointing the gun at Officer Sekely, putting his finger on the trigger, and attempting to fire. The fact that the officers acted quickly and were able to successfully protect themselves from harm should not weigh in defendant's favor.

Defendant points to evidence (particularly his own testimony) that his intent was to kill himself not the officers. It is not necessary for the prosecution to disprove every reasonable theory of innocence. See *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002); *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984). Moreover, "'[i]t is the jury's task to weigh the evidence and decide which testimony to believe.'" *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008), quoting *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

Deferring to the jury's assessment of witness credibility, and viewing the evidence in the appropriate light, there was sufficient evidence presented for the court to deny defendant's motion for directed verdict, and there was sufficient evidence for the jury to conclude that defendant had the intent to kill Officer Sekely.

Defendant next argues that his convictions of assault with intent to murder and felonious assault violated his right to be free from double jeopardy. We disagree. Because defendant failed to raise this double jeopardy claim below, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999).

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect a defendant from successive prosecutions and multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). Successive prosecutions are not barred by double jeopardy protections when either charge requires proof of an element that the other does not. *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), overruled in part on other grounds by *People v Martin*, 271 Mich App 280; 721 NW2d 815 (2006); *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007).

As previously indicated, the elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Brown*, *supra*. The elements of assault with a dangerous weapon (felonious assault) are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). In order to sustain a charge of assault with intent to murder, the prosecution must prove that the defendant had an actual intent to kill that, if successful, would be murder. This element is not found in felonious assault. Further, for felonious assault, the prosecution must prove that the defendant had a dangerous weapon in order to be convicted. The defendant need not be armed with a dangerous weapon to be found guilty of assault with intent to murder. Therefore,

because each charge requires proof of an element that the other does not, there is no double jeopardy violation.

Moreover, considering the charges in question, the charge of assault with intent to commit murder focuses on punishing the defendant who intends to take the life of another. On the other hand, felonious assault seeks to punish the defendant who assaults another with a dangerous weapon, although it is not necessary for the assault to rise to the level of intending to take the life of another. Here, defendant has been charged and convicted for his actions of intending to kill Officer Sekely, and also for his actions of using a dangerous weapon to carry out the assault.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering